



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2011-0958; FRL- 9725-4]

#### **Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Amendments to West Virginia's Ambient Air Quality Standards**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving the State Implementation Plan (SIP) revision submitted by the State of West Virginia (West Virginia) on July 8, 2011. This revision pertains to amendments of West Virginia's Legislative Rule regarding ambient air quality standards (45 CSR 8 - Ambient Air Quality Standards). These amendments incorporate by reference the National Ambient Air Quality Standards (NAAQS) in effect on June 1, 2010 for sulfur dioxide (SO<sub>2</sub>), particulate matter (PM), carbon monoxide (CO), ozone, nitrogen dioxide (NO<sub>2</sub>), and lead. This action is being taken under the Clean Air Act (CAA).

**DATES:** This final rule is effective on [insert date 30 days from date of publication].

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number **EPA-R03-OAR-2011-0958**. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and

will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Asrah Khadr, (215) 814-2071, or by e-mail at [khadr.asrah@epa.gov](mailto:khadr.asrah@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On February 22, 2012, EPA published a notice of proposed rulemaking (NPR) for West Virginia. 77 FR 10423. The NPR proposed approval of the revised regulation, 45 CSR 8 - Ambient Air Quality Standards, submitted by West Virginia for inclusion in the West Virginia SIP, which also included the removal of sections 45-8-2 (Anti-Degradation Policy), 45-8-4 (Ambient Air Quality Standards), 45-8-5 (Methods of Measurement), and 45-8-6 (Reference Conditions). The revised regulation, 45 CSR 8, incorporates by reference the NAAQS for SO<sub>2</sub>, PM, CO, ozone, NO<sub>2</sub>, and lead. Additional background information is discussed in detail in the NPR. Three adverse comments were submitted in response to EPA's NPR. Summaries of the comments and EPA's responses are provided in section II of this document.

## **II. Summary of Public Comments and EPA Response**

**Comment:** EPA received comments on the proposed rulemaking from Mr. Robert Ukeile for Sierra Club (hereafter referred to as “commenter”). The commenter expressed concern for the approval of the West Virginia SIP revision. The commenter perceives West Virginia’s incorporation by reference of 40 CFR Parts 50 and 53 effective June 1, 2010 to be out of date upon EPA approval of the SIP revision. The commenter suggested that EPA conditionally approve the SIP revision contingent upon West Virginia submitting the legislative rule with the current versions of 40 CFR Parts 50 and 53.

**Response:** EPA disagrees with the commenter’s statement that a conditional approval is warranted here. EPA is approving into the West Virginia SIP a revised version of 45 CSR 8 which adopts as state air quality standards the NAAQS for SO<sub>2</sub>, PM, CO, ozone, NO<sub>2</sub>, and lead by incorporating by reference 40 CFR Parts 50 and 53, effective June 1, 2010, into 45 CSR 8. This proposed SIP revision was submitted to EPA on July 8, 2011.

It is important to note that 45 CSR 8 adopts those national ambient standards promulgated by EPA as ambient air quality standards for the State of West Virginia. *See* section 45-8-1. Neither the rule, nor its approval into the SIP, has any effect on the NAAQS promulgated by EPA, or on SIP requirements to attain and maintain the NAAQS in West Virginia. In particular, the West Virginia Prevention of Significant Deterioration (PSD) program, which is contained in a separate regulation, continues to require compliance with the NAAQS as promulgated by EPA. *See* section 45-14-9.

The State of West Virginia's legislative rulemaking is a lengthy annual process. The legislature meets from January to March, at which time an agency approved rule is reviewed by the appropriate legislative committees. An agency approved rule is approved in a legislative bill and is then sent to the governor for signature in April and most often becomes effective a month later in May. This makes West Virginia's rulemaking process an ongoing task that is most often a year behind. Because of this yearly process, any rules published by EPA after April cannot be accommodated in the rulemaking process of that respective year. Therefore, the revisions to 45 CSR 8 which are relevant here were approved in the West Virginia legislative process in the spring of 2011, but reflect the June 1, 2010 versions of 40 CFR Parts 50 and 53 because that is the latest annual edition of the federal regulations which were available at the time of the West Virginia legislative approval process in the spring of 2011. EPA notes, however, that West Virginia has a practice of regularly revising its regulations to adopt any changes in applicable NAAQS. EPA is approving these regulation changes into the West Virginia SIP as a SIP strengthening measure.

**Comment:** The commenter expressed concern about EPA's approval of the removal of the Anti-Degradation Policy in section 2 of 45 CSR 8. The commenter perceived the removal of the Anti-Degradation Policy to relieve West Virginia from obtaining and maintaining the best possible air quality. The commenter stated that removal of this policy would no longer require the Secretary of the West Virginia Department of Environmental Protection (WVDEP) to produce plans to protect the air quality in attainment areas. The commenter expressed concern that the removal of this policy would allow air quality to degrade in attainment areas. Specifically, the commenter was concerned that the removal of this provision would cause West

Virginia's minor source program to no longer comply with 42 U.S.C. 7410(a)(2)(A) and (C).

The commenter perceived the removal of the Anti-Degradation Policy to be a relaxing of regulations in the West Virginia SIP and that EPA did not perform the appropriate anti-backsliding analysis required under 42 U.S.C. 7410(l). The commenter suggested that EPA disapprove the removal of the Anti-Degradation Policy from the West Virginia SIP.

**Response:** EPA disagrees that removal of the Anti-Degradation Policy will allow air quality to degrade in attainment areas in West Virginia. EPA notes that, as stated in the Environmental Protection Advisory Council meeting minutes included in the SIP submission, the Anti-Degradation Policy was added to 45 CSR 8 in the early 1970s as "a placeholder in anticipation of the future PSD program and its provisions for best available control technology." Minutes of Environmental Protection Advisory Council Meeting (June 3, 2010) at 2. Subsequently, statutory requirements for a PSD program were added to the CAA, EPA promulgated regulations, the State of West Virginia adopted a PSD program under 45 CSR 14, and the program became part of the West Virginia SIP. *See* 51 FR 12517 (April 11, 1986) (effective May 12, 1986). Similarly, West Virginia's minor source permitting program at 45 CSR 13 was approved into the West Virginia SIP on February 8, 2007. West Virginia's SIP-approved permitting programs provide the means by which West Virginia ensures maintenance of air quality and the requirement for best available control technology (BACT), consistent with the Anti-Degradation Policy. The Anti-Degradation Policy does not impose any additional requirements on sources, nor does its removal from the SIP excuse sources from having to comply with West Virginia's PSD, non-attainment NSR, or minor source programs. Accordingly, EPA has concluded that removal of the Anti-Degradation Policy will not interfere

with attainment and maintenance of the NAAQS, or with any other applicable requirement of the CAA, and the SIP revision satisfies CAA section 110(l).

**Comment:** The commenter expressed concern that WVDEP did not provide “reasonable notice” required under CAA Section 110(a)(1) because WVDEP did not mention that changes to 45 CSR 8 included the removal of the Anti-Degradation Policy during the public hearing.

**Response:** EPA disagrees with the commenter and believes West Virginia provided adequate public notice and an adequate opportunity for a public hearing. The requirements for public hearings for SIP revisions are in 40 CFR 51.102 which requires states to provide notice of the hearing, the opportunity to submit written comments, and the opportunity for the public to request a public hearing. The notice required by 40 CFR 51.102 is notice of the date, place and time of the public hearing. In addition, 40 CFR 51.102 also requires, *inter alia*, notice in a prominent advertisement and availability of the proposed SIP revision for public inspection in at least one location. The commenter does not challenge the content of the notice, and indeed West Virginia’s public notice for this SIP revision provided the location, website and contact phone number to obtain copies of the proposed rules at the time. All interested parties and persons had the ability to obtain more details about the proposed revision in at least one location. All notices for the public hearing were made at least 30 days prior to the date of the public hearing. West Virginia included in its submittal the affidavit of publication of the hearing notice in the Charleston newspapers and a copy of the West Virginia Register which contains a notice for the public hearing, as well as a transcript of the public hearing with a certification from the court reporter. Therefore, West Virginia has met the requirements for public hearings in 40 CFR

51.102. Furthermore, EPA notes that in opening of the public hearing, the representative of WVDEP clearly and accurately stated that the purpose of the public hearing was to accept comment on revisions to 45 CSR 8. Any person wishing to make comments on any aspect of the revisions was free to do so.<sup>1</sup>

### **III. Final Action**

EPA is approving the updated version of 45 CSR 8 into the West Virginia SIP. This revision is being approved as a SIP strengthening measure for the West Virginia SIP.

### **IV. Statutory and Executive Order Reviews**

#### **A. General Requirements**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);

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<sup>1</sup> According to the transcript, neither this commenter, nor any other commenter, submitted comments to West Virginia at the public hearing.

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.



## **B. Submission to Congress and the Comptroller General**

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

## **C. Petitions for Judicial Review**

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action pertaining to the ambient air quality standards may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: August 23, 2012.

W. C. Early, Acting  
Regional Administrator,  
Region III.

40 CFR Part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart XX--West Virginia

2. In § 52.2520, the table in paragraph (c) is amended by:

- a. Revising the title for 45 CSR Series 8.
- b. Revising the entries for Sections 45-8-1 through 45-8-4.
- c. Removing the entries for Sections 45-8-5, 45-8-6, and 45-8-7.

The amendments read as follows:

§ 52.2520                      Identification of plan.

\*       \*       \*       \*       \*

(c) \*\*\*

EPA-Approved Regulations in the West Virginia SIP

State citation [Chapter 16-20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
*       *       *	*       *       *       *			
<b>[45 CSR] Series 8 Ambient Air Quality Standards</b>				
Section 45-8-1	General	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	Incorporation by reference of the National Ambient Air Quality Standards.
Section 45-8-2	Definitions	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	Revised section moved from 45-8-3 to 45-8-2.

<b>State citation [Chapter 16-20 or 45 CSR]</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/ citation at 40 CFR 52.2565</b>
Section 45-8-3	Adoption of Standards	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	Section was revised to read new title and content.
Section 45-8-4	Inconsistency Between Rules	6/16/11	[Insert Federal Register publication date] [Insert page number where the document begins]	Revised section moved from 45-8-7 to 45-8-4.
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Date: 09/12/2012]